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Conservation agreements and environmental governance: The role of nongovernmental actors

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This article explores how conservation agreements can be used to examine the trend towards environmental governance by multiple players, where nongovernmental bodies play a part in environmental regulation. The laws authorizing the creation of a conservation agreement in three jurisdictions, namely New South Wales (Australia), Scotland (United Kingdom) and Maine (United States), move away from regulation by government, where governmental bodies play the pivotal role in environmental governance, towards governance by multiple players. This article illustrates how the different legal features regarding who can create, oversee and enforce a conservation agreement reflect different styles and levels of engagement in environmental regulation. The Australian law represents a model of nature conservation heavily relying on governmental regulation. This is different from the United States model, where nongovernmental bodies play a significant role in the burgeoning use of conservation agreements. The Scottish model is placed somewhere between those in that while it confers the primary role on specified governmental bodies, some nongovernmental conservation bodies can in some circumstances be designated to fulfil the same function. The different levels of participation by governmental and nongovernmental bodies discussed in this article reveal strengths and weaknesses in involving different ranges of actors in environmental governance and point to lessons as other jurisdictions consider embracing conservation agreements to support their conservation policy.

1 INTRODUCTION

One feature in the evolution of environmental law in recent decades has been a move away from direct regulation as the sole means of regulating the human impact on the environment. The earlier emphasis was on 'command and control' regulation, using the criminal law and permitting systems to limit directly harmful activities, but reliance on this has been challenged by 'a growing belief that it was both ineffective and inefficient'.[1] From carbon taxes to emissions trading, a much wider 'toolkit' is now being used. The trend towards a new paradigm of environmental regulation entails that key roles in environmental governance[2] no longer rest solely in the hands of governmental bodies but are shared by multiple players.[3] The private sector is changing its role from being a

[1] K Hawkins, 'General Editor's Introduction' in N Gunningham and P Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998) vii.

[2] Godden and Peel observe that environmental governance is not a traditional term used in environmental law, which entails the use of legal remedies to discrete environmental problems. However, they emphasize that environmental governance relates to environmental law as environmental law is influenced by a framework of policy, institutional and social structures; L Godden and J Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press 2010) 61.

[3] Gunningham and Holley recently argued that the trend of environmental regulation is moving from a mere reliance on law and regulation, with State bodies as the central players, towards a new paradigm of environmental governance with multiple players; N Gunningham and C Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12 Annual Review of Law and Social Science 273, 274–275; C Holley and N Gunningham,

mere regulatee to acting as an entity that regulates itself. This shift to a more diverse view of environmental governance offers the opportunity to use new regulatory tools where nongovernmental actors can play a major role.[4]

The world faces a biodiversity crisis as severe as the climate crisis,[5] but in comparison to pollution and greenhouse gas controls, conservation law has been slower to move away from direct regulation and a reliance on designating sites and species for special protection.[6] Yet other legal mechanisms do exist, and are well-established in some places, offering different ways in which bodies outside government can play a role in the legal regulation of how land is conserved and managed for the benefit of the natural ecosystem. One such vehicle is the use of conservation agreements (CAs), voluntarily created but enduring restrictions on how land will be managed.

To examine the application of this new approach in the area of land conservation, this article analyses conservation agreement laws (CA laws)[7] concerning the roles of governmental and nongovernmental bodies (hereinafter NGO(s)) in three jurisdictions, namely New South Wales (NSW, Australia), Scotland (United Kingdom, UK) and Maine (United States, US).[8] These are all jurisdictions where detailed legislation has established a scheme for giving legal effect to conservation agreements, but where different choices have been made concerning the actors involved. Since the locations share an advanced level of economic development and western liberal democracy, the different options chosen are likely to reflect a degree of express choice in regulatory design rather than being driven wholly by wider socioeconomic or political factors. The analysis examines first the extent to which in the three jurisdictions the laws on the governance of CAs move away from regulation purely by government towards the encouragement of roles for NGOs. It will then consider the implications of the different models studied, illustrating strengths and weaknesses in the different approaches and lessons for drafting CA schemes as other jurisdictions consider widening their legal toolkit for conservation.

It is worth emphasizing at the beginning that although NGOs play a limited role in CA governance and the focus is on the specific vehicle of CAs, there is still a wide range of other options, involving both legally binding and non-legal tools, to allow them to participate in conservation governance. The options include acquiring land and using their powers as landowners for conservation purposes. Within Scotland, charities such as the John Muir Trust[9] hold substantial areas of land, and in Australia NGOs can play a role in land conservation by purchasing land for conservation purposes through the National Reserve System Program,[10] which can lead to

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'Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?' (2011) 24 New Zealand Universities Law Review 309, 335.

[4] E Fisher, B Lange and E Scotford, *Environmental Law: Text, Cases, and Materials* (Oxford University Press 2013) 505.

[5] 'The biosphere, upon which humanity as a whole depends, is being altered to an unparalleled degree across all spatial scales. Biodiversity – the diversity within species, between species and of ecosystems – is declining faster than at any time in human history.' Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), 'Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' (IPBES Secretariat 2019) 10.

[6] CT Reid and W Nsoh, *The Privatisation of Biodiversity?* (Edward Elgar 2016) 1–26.

[7] Conservation agreement law in this article refers to the statute which authorizes the creation of conservation agreement, a private law instrument creating obligations on landowners to require them to do or not to do specific tasks to conserve features on the land they own.

[8] For a wider comparison and survey see S Boonrueang, 'A Legal Proposal for the Creation of Conservation Agreements in Thailand: A Comparative Study' (PhD Thesis, University of Dundee 2020) 97–203.

[9] John Muir Trust, *Land Report 2017*: *Managing Wild Land for People and Wildlife Land* (John Muir Trust 2017).

[10] Australian Government Department of the Environment and Energy, 'National Reserve System Ongoing Management' <www.environment.gov.au/land/nrs/management>.

government funding and management support.[11] Much more practical conservation work is done on an informal basis.

This article is structured as follows. Section 2 elaborates how the legal mechanisms for nature conservation are shaped by government regulation, and how far there is a role for NGOs. Section 3 specifically examines how CAs can play a role in nature conservation, setting out the crucial elements of a CA and the roles of both public and non-public bodies. Section 4 studies the development of CA law in the chosen jurisdictions and draws comparisons in relation to the roles of relevant bodies in the creation, oversight and enforcement of a CA obligation. Section 5 places this legal mechanism in the context of the move away from regulation by government alone towards governance by multiple players, highlighting some of the legal benefits and risks in such an approach. Section 6 offers a summary of the key features and contributions of this article, arguing that there is no single answer to the question of whether NGOs should be included among those able to create, hold and enforce CAs because the choice has to be made on the basis of a number of variables.

2 ROLES OF GOVERNMENTAL BODIES AND NGOS IN NATURE CONSERVATION LAW

As environmental governance entails consideration of how the actors relevant to environmental issues interact with each other,[12] it is worth considering the actors legally empowered by the law on nature conservation and the roles they play.

This section provides an overview of how governments, often in the form of statutory conservation agencies, act to further conservation both in their capacity as landowner and through the direct regulation of land use and of activities that affect biodiversity, especially vulnerable habitats and species. NGOs can act as partners in the governmental activity or in an informal supportive role.

2.1 Government regulation and nature conservation law

Governmental actors are central in implementing and enforcing nature conservation law. Many legal measures vest powers and duties on environmental issues in a particular governmental or statutory body.[13] In the UK, for instance, the primary power for nature conservation is bestowed on Natural England, Natural Resources Wales, Scottish Natural Heritage and Council for Nature Conservation and the Countryside for Northern Ireland.[14] In Maine, the Department of Inland Fisheries and Wildlife owns and acquires land to protect species and habitats and controls the endangered and threatened species list.[15] In NSW, the Minister for the Environment plays a vital part in imposing conservation measures under the Biodiversity Conservation Act 2016 (BCA

[11] B Boer and S Gruber, *Legal Framework for Protected Areas: Australia* (IUCN Environmental Policy and Law Paper No 81 2010) para 39.
[12] Godden and Peel (n 2) 61; LJ Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012) 70.
[13] CP Rodgers, *The Law of Nature Conservation* (Oxford University Press 2013) 34.
[14] See the Natural Environment and Rural Communities Act 2006, s 32(1).
[15] See generally Maine Department of Inland Fisheries and Wildlife, 'Wildlife' <www.maine.gov/ifw/fish-wildlife/wildlife/index.html>.

2016).[16] Conventional approaches for nature conservation generally involve the use of legal power to implement and enforce the law based on direct regulation.[17] The mainstay of this regulatory style involves bestowing of legal power on governmental bodies to implement and enforce the law with a specific legal instrument;[18] for example, common approaches include the designation of a national park to protect a sensitive natural area or endangered wild animals, coupled with prohibitions and offences against harming important features in the designated area.[19] Another technique is using rules to control the use of land, entailing an assessment and approval through a grant of planning permission by a competent body where certain land use activities are proposed.[20] Beyond such direct controls, many jurisdictions also employ CAs for protecting the land, as will be discussed in Section 4.

2.2 NGOs and nature conservation law

Although the law vests a primary role in nature conservation in governmental bodies,[21] NGOs also play a part, especially in practical management. Preston observes that NGOs and community associations act as 'surrogate regulators' and play various functions in environmental regulation. These include the functions in promoting, formulating and administering[22] as well as enforcing and shaping environmental regulation.[23] In most cases, these types of bodies take part in conservation of nature on a voluntary and informal basis.[24] For instance, they have a role in gathering scientific information, raising environmental awareness of the public as well as potentially filing environmental lawsuits. NGOs can also utilize standard private law instruments to further their goals, most notably in relation to land where the rights of ownership enable a conservation-minded individual or body to acquire and manage land for the benefit of nature.[25] Short of acquiring ownership, bodies can seek to protect land from alterations in use that would affect the habitat through agreements between adjacent landowners or between a current and future landowner.[26]

Some conservation programmes make use of the voluntary and informal role of NGOs. In Australia, for instance, Land for Wildlife was initiated by a group of experts to encourage and

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[16] For instance, the power to enter into a biodiversity stewardship agreement and to declare an area of outstanding biodiversity value (BCA 2016 (NSW) ss 3.1 and 5.5).

[17] CT Reid, *Nature Conservation Law* (3rd edn, W Green 2009) para 1.6.1.

[18] B Lange, 'Command and Control Standards and Cross-Jurisdictional Harmonization' in E Lees and JE Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019) 852, 853–854; R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2012) 2.

[19] See generally C de Klemm and C Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* (IUCN 1993) 165–166; CT Reid, 'Protection of Sites' in Lees and Viñuales (n 18) 834.

[20] Reid (n 17) para 8.2.1.

[21] ibid para 2.1.1.

[22] In the UK, land managed by bodies other than the statutory conservation bodies can be recognized as a statutory National Nature Reserve (Wildlife and Countryside Act 1981, s 35).

[23] B Preston, 'Regulatory Organization' in Lees and Viñuales (n 18) 735–738.

[24] Reid (n 17) para 2.8.1.

[25] C Reid, 'Employing Property Rights for Nature Conservation' in C Godt (ed), *Regulatory Property Rights: The Transforming Notion of Property in Transnational Business Regulation* (Brill/Nijhoff 2016) 169.

[26] See the private law options that can be used to conserve natural features on land discussed in Law Commission (England and Wales), *Conservation Covenants: A Consultation Paper* (Law Com CP No 211, 2013) paras 2.31–2.55.

advise landholders in managing habitat for wildlife on their parcels of land.[27] One of the advantages of this type of approach is that it is not based on the creation of formal restrictions or obligations in relation to how land is managed but seeks to raise awareness of the needs of nature and the benefits it brings. Hence, it is flexible for landowners to opt in to and out from the programme, and encourages them to enter into a soft commitment.[28]

3 THE ROLE OF CONSERVATION AGREEMENTS IN CONSERVATION ON PRIVATE LAND

CAs have been used for securing valuable features on private land in many jurisdictions, including in Australia[29] and the US.[30] Though called by different names[31] and implemented to deal with a different breadth of purposes, CAs in those jurisdictions share some common features which make this tool different from a simple contractual arrangement.[32] Although there is no complete agreement on what the key features of a CA are,[33] this article will employ the definition used by the Law Commission for England and Wales. It provides that:

> *A conservation covenant is an agreement made between a landowner and a conservation body which ensures the conservation of natural or heritage features on the land. It is a private and voluntary arrangement made in the public interest, which continues to be effective even after the land changes hands.*[34]

As observed from the above definition, the key characteristics of a CA are that it is a statutory legal vehicle, voluntarily created between a conservation body (holder) and a landowner. Although a CA is always voluntary in legal form, there may be circumstances where some landowners consider that they have very little real choice over whether to enter such an agreement.[35] Another feature is that a CA is created to conserve some features on land to serve an agreed conservation aim, for instance, to conserve endangered species on the land. This requires the landowner to take certain actions (or refrain from doing so) that could help achieve the purpose of the agreement.[36] This might include an obligation to avoid clearing the land or to plant more

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[27] Land for Wildlife, 'Land for Wildlife Southeast Queensland' <www.lfwseq.org.au/>.

[28] S Kamala, M Grodzinska-Jurczaka and G Brown 'Conservation on Private Land: A Review of Global Strategies with a Proposed Classification System' (2015) 58 Journal of Environmental Planning and Management 576, 583.

[29] JA Fitzsimons, 'Private Protected Areas in Australia: Current Status and Future Directions' (2015) 10 Nature Conservation 1, 5.

[30] LA Ristino and JE Jay (eds), *A Changing Landscape: The Conservation Easement Reader* (Environmental Law Institute 2016) 511.

[31] For instance, they are called conservation covenants, conservation burdens, conservation covenants and management agreements. See Section 4.1.

[32] Some literature uses different terms to distinguish these agreements from ordinary contracts governed by simply the general private law. This includes the use of the term 'conservation covenant'; Reid and Nsoh (n 6) 179.

[33] See the different definitions in A Kwasniak, 'Conservation Easements: Pluses and Pitfalls Generally and for Municipalities' (2009) 46 Alberta Law Review 651, 655; E Byers and KM Ponte, *The Conservation Easement Handbook* (Land Trust Alliance 2005) 7.

[34] Law Commission (England and Wales), *Conservation Covenants* (Law Com No 349 2014) para 1.1.

[35] J Owley, 'The Emergence of Exacted Conservation Easements' (2006) 84 Nebraska Law Review 1043, 1094–1099.

[36] As the purpose of conserving some natural, historical or cultural features on the burdened land is for the benefit of everyone in society and future generations, this means that the use of this tool serves the public interest. See Law Commission (n 34) para 3.22.

native vegetation. CAs can work alongside conventional land-use control law, requiring a landowner to perform activities which are beyond those required by a mainstream legal measure, for instance supplementing a statutory prohibition on clearing native vegetation by agreeing a positive obligation to undertake new planting of native species.[37]

The obligation arising from this type of agreement is distinctive in that it runs with the burdened land and binds future landowners, and such an obligation lasts in perpetuity or for a long period. Given the aim is to secure long-term benefits for biodiversity, it is essential that the agreement is secured by imposing a restriction on the title acquired by successor landowners, rather than coming to an end when the land is transferred from the original party (for whatever reason, for example sale or inheritance). A CA is thus a legal option that a current owner may enter into with a conservation body to use the land in the desired way in perpetuity or a long period. Another feature of this legal tool is that, in many jurisdictions, special statutory intervention is required to overcome the common law impediment that generally prohibits long-term burdens on title unless for the benefit of specific neighbouring land.[38]

4 LEGAL BACKGROUND AND ROLES OF CONSERVATION AGREEMENT HOLDERS IN THE COMPARATOR JURISDICTIONS

Looking in more detail at the CAs implemented in NSW, Scotland and Maine entails first a brief history of the legal background of the development of the law in each jurisdiction.[39] Then the focus is on the bodies who hold CAs in those jurisdictions and the implications for governance of land conservation of this form of regulating land use. The observations below show that governmental bodies continue to play a central role, even being in some cases the only party with whom landowners can enter a CA. In other cases, NGOs are given a more prominent role, but even here may be subject to considerable governmental oversight.

4.1 Legal background

Across Australia, CAs appear with different names, including conservation covenants, conservation agreements, wildlife refuge agreements and nature conservation trust agreements, depending on which statute authorizes their creation.[40] Within Australia, NSW is an appropriate focus for study since its recently enacted BCA 2016 brought about some changes to nature conservation governance, including creating a new voluntary mechanism under the name of 'private land conservation agreements',[41] building on previous experience across Australia.

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[37] An example of this type of agreement is the property agreement implemented under the Native Vegetation Conservation Act 1997 of NSW, Australia. This type of arrangement has changed its name and is now implemented under the label of private land conservation agreements under BCA 2016, as discussed in Section 4.1.

[38] G Korngold 'Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection' (2011) 28 Wisconsin International Law Journal 585, 594; E Peden, 'Conservation Agreements – Contracts or Not?' (2007) 25 Environmental and Planning Law Journal 136, 140 and 145.

[39] How CAs are characterized in legal terms varies among the comparator jurisdictions. CA laws in the United States are commonly seen as part of real property law, operating to create property rights, while those in NSW are viewed as a distinct form of statutory agreement.

[40] For a brief summary of the key features and the development of CAs in NSW, see Environmental Defenders' Office (EDO) 'Conservation on Private Land - Fact Sheet' <www.edonsw.org.au/conservation_on_private_land>.

[41] See BCA 2016 (n 16) Pt 5.

In the United States, the term 'conservation easement' is the common name for a CA. The word 'easement' indicates its nature as an instrument creating a 'property right on real property'.[42] Conservation easements have been introduced by many state laws and become widely used since the 1950s.[43] A model law[44] seeking to establish a common pattern for the rules governing conservation easements emerged from a national conference held in 1981 by the Uniform Law Commission[45] in the form of the Uniform Conservation Easement Act (UCEA), which was updated in 2007.[46] Moreover, the Internal Revenue Code has encouraged the creation of conservation easements[47] since a landowner who donates their land under this type of agreement is entitled to claim a tax deduction.[48] This feature has also led to easements in perpetuity becoming the standard form adopted, since the tax deduction is available only for the creation of permanent easements.

Maine presents an appropriate representative of the state law in the US because of recent reforms and the popularity there of employing CAs to conserve private land. According to the National Conservation Easement Database, which is a substantial but not comprehensive compilation of records across the US, NGOs hold the land protected under CAs for more than 45 percent.[49] Pidot observes that, in Maine, NGOs hold or jointly hold the conservation easement over more than 70 percent of the land subject to conservation easements.[50] This state also has more than 100 local land trusts operated by unpaid staffs.[51] Law reform in 2007 also made Maine one the states in the US that has an up-to-date and comprehensive CA law.[52]

Various forms of CA have been used in Scotland for decades with different names under various Acts, but they have been used as a narrowly focused and short-term device. For example, management agreements under the Wildlife and Countryside Act 1981 help to control the management of designated sites, but are of fixed duration. The latest, and broadest, legal instrument falling under the umbrella term of CA is a conservation burden. Unlike management agreements, conservation burdens are not created under the law on nature conservation, but are an outcome of wider land law reform, taking effect under the Title Conditions (Scotland) Act 2003.[53] As this legal tool is a subsidiary aspect of the more general laws of real burdens,[54] the Act sets out

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[42] F Cheever and NA McLaughlin, 'An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law' (2015) 1 Journal of Law, Property and Society 107, 111.

[43] ZA Bray, 'Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements' (2010) 34 Harvard Environmental Law Review 120, 127.

[44] Uniform Law Commission, 'What is a Model Act?' <www.uniformlaws.org/acts/overview/modelacts>.

[45] Model Laws drafted by the Uniform Law Commission are not legally binding. The model laws are used as guidance to suggest that states in the US draft their laws based on the concepts contained in such model laws. See also <www.law.cornell.edu/uniform>.

[46] See Uniform Law Commission, 'Conservation Easement Act' <www.uniformlaws.org>.

[47] DI Halperin, 'Incentives for Conservation Easements: The Charitable Deduction or a Better Way?' (2011) 74 Law and Contemporary Problems 29, 35.

[48] Internal Revenue Code, s 170(h)(4).

[49] National Conservation Easement Database, 'Profile: Easement Holders by States' <www.conservationeasement.us/state-profiles/>.

[50] J Pidot, 'Conservation Easement Reform: As Maine Goes Should the Nation Follow?' (2011) 74 Law and Contemporary Problems 1, 5–6.

[51] ibid.

[52] ibid.

[53] CT Reid, 'Conservation Covenants' (2013) 77 Conveyancer and Property Lawyer 176, 179.

[54] In general, real burdens in Scotland are a property law instrument similar to servitudes or easements in other jurisdictions. They can be created to impose obligations (conditions) on one parcel of land for the benefit of another parcel of land. See Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) para 1.1.

few rules specifically for conservation burdens and many are shared or apply as part of the rules in common with other types of 'real burdens', the Scots law term for conditions limiting title to land. Only a few conservation burdens have been employed, primarily to conserve features of cultural rather than natural heritage.[55]

4.2 Relevant actors and roles in CA governance

One of the crucial features of a CA is that it is created between a landowner and a body fulfilling a conservation role. This begs the question of who qualifies as a 'conservation body', who can enter into a CA with a landowner, and whether this is a role solely reserved for governmental bodies. The choice made on this issue is crucial from the perspective of environmental governance, as discussed in Section 4.3 and Section 5.

In NSW, the Biodiversity Conservation Act 2016 offers different forms and titles of CAs under the common label of private land conservation agreements.[56] They comprise biodiversity stewardship agreements, conservation agreements and wildlife refuge agreements.[57] The key point is that the entitlement to make these three forms of agreement is an exclusive power of specified governmental conservation bodies.[58] A CA can be created only with a specified statutory body as one party to the agreement. The legislation in NSW does not make express provision on how CAs will be overseen or administered by the statutory body – this is left to the individual agreements – but does provide what to do where a burdened landowner has failed to comply or fulfil with the obligation. In this instance, the statutory body who made a CA can bring a civil action to the court for remedy.[59] Moreover, an interesting feature observed in NSW is that where there is a breach of a biodiversity stewardship agreement, one of the categories of private land conservation agreement, the law also allows any individual to participate in CA enforcement,[60] rather than restricting this to the parties to the agreement.

Maine's CA law enables both governmental bodies and NGOs to enter into and hold a conservation easement.[61] A landowner can donate or enter into a conservation easement with either sort of entity. Not all NGOs can create or hold an interest in a conservation easement. This entitlement is exclusively reserved for a non-profit corporation or charitable trust established with qualifying conservation purposes,[62] for example, the purposes of: retaining or protecting the natural, scenic or open space values of real property, or assuring the availability of real property for agricultural, forest, recreational or open space use.[63] Additionally, Maine is one of a few states in the US providing a clear provision on compliance monitoring. Under the CA law revised in

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[55] CT Reid, 'Conservation Easements in the United Kingdom' in Ristino and Jay (n 30) 511.

[56] The word 'private land' is unclear and potentially confusing. Some consider indigenous land as falling within this type of land, but others view areas owned by indigenous people as an independent category (see the categorization into public land, private land and indigenous land at Natural Resource Management Ministerial Council, *Australia's Strategy for the National Reserve System 2009–2030* (NRMMC 2009) 42).

[57] BCA 2016 (n 16) s 1.6.

[58] The first can be created by the Minister for Environment, the latter two can be entered into by the Biodiversity Conservation Trust, a statutory body under the new legislation (see ibid ss 5.5, 5.20 and 5.27).

[59] ibid s 13.5(2).

[60] ibid s 13.15(1).

[61] Almost all of the states in the US, except for North Dakota, have conservation easement enabling statutes, and all of them employ the same idea in allowing both government and non-government bodies to hold a conservation easement.

[62] RH Levin, *A Guided Tour of the Conservation Easement laws* (Land Trust Alliance 2010 (updated 2014)) 5.

[63] Maine Revised Statutes, §476.

2007 (Maine Revised Statutes), an easement holder is entitled to enter into a burdened property to inspect the property and ensure compliance.[64] At the same time, a holder is required to monitor compliance at least every three years, coupled with a duty to prepare and keep a written monitoring report in its permanent records.[65] Burdened landowners can request the copy of this report. This could help ensure that conservation easements, the majority of which are in the hands of NGOs, will be monitored.

Enforcement for a breach of obligation and action affecting the implementation of a conservation easement are other noteworthy points. Similar to the laws of other states in the US, the law in Maine provides for various governmental bodies to bring an action based on a conservation easement to a court. The holder plays this role by default, but some others, including a person expressly granted a third-party right of enforcement in the agreement and the Attorney General, may come into play where certain conditions are met.[66] The role of the court under the law of Maine is also interesting, extending to deciding whether to allow the parties to a conservation easement to amend or terminate it. The law articulates that the amendment and termination cannot proceed if it would materially detract from the conservation values intended for protection, unless it is approved by the court subject to the conditions laid down by the law.[67]

In Scotland, the coming into effect of the Title Conditions Act (Scotland) 2003 (TC(S)A 2003) is the starting point for the implementation of a perpetual agreement for the conservation of features on land, establishing the rules for the creation of a conservation burden. The Scottish approach is interesting in that the legal approach to defining qualified holders lies between those of Australia and Maine. It vests a primary role on individual governmental bodies, but NGOs may be included where they meet specific conditions. Although the primary role in creating conservation burdens is conferred on the Scottish Ministers and Scottish Natural Heritage (as a statutory conservation body),[68] some other bodies, both governmental and nongovernmental, are entitled to undertake this task when they have been designated as a competent conservation body under regulations made under the 2003 Act. The list of designated bodies includes all Scottish local authorities and some nature and heritage conservation groups.[69] The prime qualification to be designated is that those bodies must have an objective in relation to the conservation of certain heritage features.[70] Designation as a conservation body can be withdrawn from an NGO, which means that it will no longer be eligible to hold a conservation burden. In such circumstances, the burden is extinguished; alternatively, the legislation allows a holder to transfer a conservation burden to other designated bodies where the holder is unable to hold the conservation burden.[71]

4.3 Common characteristics in CA governance

The examination in the Section 4.2 shows that the selected jurisdictions adopt different legal approaches to prescribe the bodies eligible to hold a CA and their roles. Key findings are, first, that while all the jurisdictions confer a primary role on prescribed governmental bodies, some of them allow certain NGOs to hold and govern a CA. Second, with respect to the role of the qualified

[64] ibid §477.5.
[65] ibid §477-A.3.
[66] ibid §476.
[67] ibid §477-A.2.
[68] TC(S)A 2003, s 38(1).
[69] See the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003 No 453 (as amended).
[70] TC(S)A 2003 (n 68), s 38(4)(5).
[71] See the legal procedure for this transfer in ibid s 39.

holder in monitoring a CA, all three jurisdictions take a different approach. Maine provides detailed legal provisions about what measures for oversight and enforcement are required and available for implementing this legal tool, whilst in NSW and Scotland such provisions are absent or less clear. Indeed, these two jurisdictions leave monitoring for the parties to negotiate and make no special provision for enforcing the obligations. These two points of difference in the roles of governmental and NGOs in CA are examined below.

4.3.1 Primary and dominant role of governmental bodies

The first common characteristic of CA laws in the jurisdictions studied is that governmental bodies act as the central player in CA governance; states confer the primary power to create, oversee, and enforce a CA on public bodies. The law of NSW, which requires landowners to apply to a competent governmental body when they seek to enter into a CA, establishes the character of this legal mechanism as a governmental conservation tool. The Scottish model, which confers the power on the Scottish Ministers to decide which non-conservation bodies will be designated as a conservation body, reflects a dominant role for governmental bodies. The legal requirement to ask for court approval where the parties seek to amend and terminate a conservation easement under the law of Maine provides another example that the governance of this legal tool is subject to a certain level of the oversight by state bodies. These models exemplify that a primary role in CA governance in those jurisdictions is conferred on governmental or public bodies, but NGOs can play a role.[72]

4.3.2 Supplementary role of NGOs

As observed above, although the primary role of the governance of CAs is bestowed on public bodies, some CA laws do include provisions enabling non-public bodies to be involved. The legal model used in Maine moves furthest away from public regulation towards a new paradigm of environmental governance with multiple players, providing fewer conditions or restrictions for qualifying as an easement holder in comparison with the others. However, the law of Maine illustrates that nongovernmental holders are not wholly free from legal control as such bodies are still subject to some level of public oversight, as seen from the monitoring requirement noted above. The arrangement is thus not entirely one for the parties as a matter of private law. Nonetheless, Pidot notes that the law of Maine falls short of providing a full public oversight framework, not specifying the legal standard for monitoring nor sanctions for failure to comply with a monitoring requirement.[73] The failure of existing laws to provide sufficient means of ensuring effective CA stewardship is criticized by many land trusts.[74]

The CA law of NSW, by contrast, indicates the statutory character of a CA there. Landowners enter into CAs voluntarily, but this does not make this tool a wholly private law instrument. It operates as a part of a soft environmental policy instrument which remains in the

[72] This view is similar to that adopted by the Law Commission in developing a conservation covenant enabling law in England and Wales, where the primary role in holding the covenants should be vested in governmental agencies. See the full discussion at Law Commission (n 34) paras 4.6–4.64.
[73] Pidot (n 50) 11–13.
[74] NA McLaughlin and J Pidot, 'Conservation Easement Enabling Statutes: Perspectives on Reform' (2014) 33 Utah Environmental Law Review 125, 132–133.

government's hands. Although the details are flexible and subject to negotiation,[75] it is the competent governmental body that will decide whether to enter into a CA with a landowner or not.[76] However, the role of NGOs can still be seen in some aspects of biodiversity stewardship governance, as the law entitles any person to bring a civil action against a landowner who breaches the agreement. The NSW regime has some similarities with conservation burdens in Scotland, where governmental bodies play a dominant role in creating and governing conservation burdens. It is true that NGOs, for example a charitable trust dedicated to conservation, may come to hold a burden, but the Scottish approach reserves discretionary powers for the Scottish Ministers to determine which, if indeed any, NGOs will be allowed to undertake this role.

As always, there are balances to be struck in the regulatory design and there are no simple answers. The more flexibility there is in enabling NGOs to play a role, the more scope there is for inappropriate arrangements to be made which do not achieve either effective conservation (individually or when considered along with other initiatives) or value for money and thus the greater the justification for public oversight. Indeed, there may even be the potential for abuse if conservation covenants bring tangible benefits to certain parties (e.g. tax breaks or as a precondition for consent for the development of land). More generally, greater oversight may be called for the greater the role of NGOs in the design and implementation of conservation activities.

5 ADVANTAGES AND DISADVANTAGES OF DIFFERENT GOVERNING STYLES

Building on the examination of the roles of relevant actors above, the advantages and disadvantages of enabling NGOs to take part in CA governance can be examined. This discussion compares the relative merits of a multi-actor approach compared to one exclusively relying on governmental bodies.

Drawing on this study of instances of CA governance, two contrasting patterns of conservation governance can be identified, although the reality is a spectrum rather than a sharp dichotomy. The first is a model reliant on governmental regulation, which can be seen in NSW; the second enables NGOs to come into play more freely, as shown by the law of Maine. Interestingly, the Scottish approach can be considered as a hybrid between these two models, but the level of public intervention in designating an eligible conservation body makes it closer to the Australian model. This article does not argue that either one is the better but seeks to draw out what might be the strengths and weaknesses of each when looked at from an environmental governance perspective. These relative merits provide lessons for other jurisdictions contemplating developing a scheme for CAs as part of their conservation laws, noting the variables to be taken into account in making the choice in regulatory design. Different arrangements will be appropriate in different contexts depending on how a range of public interests are being pursued.[77]

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[75] J Owley, 'Neoliberal Land Conservation and Social Justice' (2012) 1 IUCN Academy of Environmental Law e-Journal 6, 7.

[76] In the case of a biodiversity stewardship agreement, a specific type of CA implemented in NSW, this condition is provided clearly in that a landowner must prepare an application to enter into this type of agreement coupled with an assessment report. The Minister, as a prospective holder can decide whether to enter into the agreement or to decline the application. This makes the process of initiating the creation of this type of conservation easement similar to the application for government's approval which is based upon command-and-control regulation (BCA 2016 (n 16) s 5.8).

[77] C Rodgers and D Grinlinton, 'Covenanting for Nature: A Comparative Study of the Utility and Potential of Conservation Covenants' (2020) 83 Modern Law Review 373, 382.

5.1 Strengths

5.1.1 Opportunity to promote governance by multiple players with diverse tools

The most measurable benefit of inviting a non-public body to participate in CA governance is that it promotes the role of multiple players in conserving private land by the use of CA.[78] The Law Commission proposing the implementation of CAs in England took the view that if CAs were to be held by environmental charities, landowners may have an option in donating some rights in their land to those charities.[79] How far this opportunity will be taken up depends on the place of CAs in the wider framework of conservation laws, but granting such bodies a significant role within a legal mechanism goes beyond just allowing, or even welcoming, their participation through other routes by making them a partner in the conservation enterprise. The fact that such a high proportion of CAs in places such as Maine are held by NGOs rather than public bodies illustrates their acceptance as significant contributors to conservation.[80]

Several advantages can be seen from such engagement of NGOs. First, it is consistent with the management of biodiversity on the basis of an ecosystem approach, which encourages looking at conservation matters on a broad canvass, and thus decentralizing biodiversity conservation to multiple communities of interest.[81] In particular, CAs where the holder is a local community may be attractive because this enhances the ease of monitoring compliance and gives the community a formally recognized interest in the success of the conservation efforts. For example, several of the bodies designated as holders of conservation burdens in Scotland are local groups.[82] Apart from that, making a local community an eligible holder can be regarded as the promotion of public participation in land-use governance itself.[83] Second, it enables legal conservation measures to be taken in line with priorities other than those of the official conservation bodies. The Woodland Trust, as one of the designated bodies in Scotland, may wish to conserve areas of woodland which they see as valuable but which fall short of meeting the criteria for designation under the statutory schemes run by national conservation authorities, and CAs provide them with a means to do so with enduring legal effect. Third, the promotion of this new governance by multiple players also offers scope for the further development of other environmental governance tools[84] linked to the implementation of a CA. An example of the opportunity to use an innovative tool involving the mechanism of a CA is the chance to use it as the means of securing a biodiversity offset, whereby

[78] Rodgers (n 13) 302.
[79] Law Commission (n 26) para 2.23.
[80] See this observation in Section 4.1. See also Pidot (n 50) 5–6.
[81] See also the Ecosystem Approach Principle 2 (Management should be decentralized to the lowest appropriate level) in Secretariat of the Convention on Biological Diversity (CBD), 'The Ecosystem Approach' CBD Guidelines (Secretariat of the CBD 2004) 10–11.
[82] Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003/453, Schedule 1 (Scottish SI); the local bodies designated so far are mostly ones with an interest in the built rather than the natural heritage of their areas.
[83] See the comprehensive discussions regarding the effects on CAs on communities in B Holligan, 'Narratives of Capital versus Narratives of Community: Conservation Covenants and the Private Regulation of Land Use' (2018) 30 Journal of Environmental Law 55, 69–71.
[84] Fisher et al (n 4) 505.

development in one place is permitted if the biodiversity harm is balanced (or more) by gains elsewhere, secured by a CA to ensure long-term protection of the offsetting site.[85]

5.1.2 Efficient utilization of resources

CA governance involving non-public bodies could look more attractive than that run by governmental bodies in terms of resources in several respects. The scale of non-public funds potentially involved can be seen from the value of conservation easements donated to NGOs in the US.[86] For example, between 2011–2013, the Foothills Land Conservancy of Maryville, Tennessee received an annual average of US$ 125 million in easements.[87] In those jurisdictions where substantial resources are available to NGOs, from public or philanthropic donations or through a biodiversity offset scheme, enabling such bodies to play a formal role in the legal conservation framework may encourage them to do so, providing the funds where payments to the landowner are included in exchange for their willingness to enter a CA.[88] Thus, greater conservation gains can be achieved than by public funds alone. Even where public funds are involved, the costs for acquiring a CA are likely to be less than those of purchasing the land, which may otherwise be the only other route to providing a legal guarantee over how the land will be managed in the future.[89]

An additional point is that the rate of uptake may also increase where the bodies involved have a less official nature. For instance, if a local community and NGOs in a particular area is entitled to hold a CA, landowners may be more willing to enter into a CA with these NGOs rather than to conclude one with the government.[90] The nongovernmental holder may be closer to the landowners, physically and in spirit, and able to develop a better relationship with regard to advising the landowners and dealing informally with any problems that arise.

5.1.3 Opportunity to secure priorities

Giving NGOs the opportunity of creating and monitoring a CA could help to avoid a conflict of priorities that can arise with certain public bodies. Some commentators note that leaving CAs in the hands of multifunctional governmental bodies such as ministers or local authorities might be problematic where the law confers other powers and duties on them,[91] for instance, where the minister also has duties in respect to promoting economic development. The conflict could happen where the minister holds a CA for wildlife habitat on certain land, and then, for example, a mining

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[85] Reid and Nsoh (n 6) 178 and 131–177. The Environment Bill introduced in the UK Parliament in early 2020 contains provisions for England to introduce both conservation covenants and a requirement for development to achieve a net gain for biodiversity, with covenants envisaged as one means of doing so where on-site gains are not possible; Environment Bill, clauses 90–92, 102–124 ([2019-21] HC Bill 9 as introduced).

[86] See the table illustrating the list of organizations receiving conservation easements in 2011; see A Looney, *Charitable Contributions of Conservation Easements* (The Brookings Institution 2017) 15–16.

[87] ibid 12.

[88] Some US scholars observe that NGOs in the US can be large and well resourced, but this might not be the case in other jurisdictions so that this attraction may not arise in other countries. See Korngold (n 38) 614–615.

[89] Some studies note that the management costs of CA implementation might be expensive, particularly when considering the costs of effective enforcement. Hence, there is a requirement for planning to manage the costs from the outset; see Green Balance, *The Potential of Conservation Covenants* (Report by Green Balance to the National Trust, Green Balance 2008) 46.

[90] Law Commission (n 34) para 4.34.

[91] Reid and Nsoh (n 6) 188.

project developer applies for a license to exploit minerals on that land. This would give rise to conflict with the minister having to decide between granting the mining license and ensuring that the land is conserved in accordance with the CA.[92] Within the public sector this risk can be reduced by conferring the power to enter CAs on a public body dedicated to conservation, but ensuring that conservation is not too easily overridden by other concerns can be enhanced by allowing CAs to be placed in the hands of those NGOs whose sole purpose is to further conservation.[93]

5.2 Weaknesses

5.2.1 Public interest, accountability and transparency

The most significant concern to be considered when authorities seek to empower NGOs to create, oversee and enforce CAs is whether those bodies will carry out these tasks for the common good. This question is linked to other considerations about accountability and transparency in implementing these tasks. In general, public or governmental bodies are given public functions to be exercised for the benefit for all,[94] a public role that nowadays is recognized as including the function of conserving natural features on land and sea.[95] These public bodies are vested with legal powers to do certain tasks, and they cannot act otherwise as they would then be acting *ultra vires*.[96] Public bodies are subject to review mechanisms in relation to how they are exercising their power, often including appeals on the merits and judicial review of legality.[97] Hence, by limiting the holding of CAs to governmental bodies, the need for them to keep within their legal powers and the opportunity to review their actions help to ensure that the public interest is served. This safeguard is missing where the task of CA governance is conferred on NGOs, as there is not the same guarantee that they will act in the public interest. Moreover, there may be questions concerning transparency,[98] particularly where the law contains no provision to make the work of NGOs transparent and accountable. Some oversight may be provided depending on the nature of the body, for instance mechanisms ensuring that the actions of charitable bodies serve their charitable purposes,[99] but this again suggests that at most a limited range of NGOs might be authorized.

5.2.2 Continuity of oversight

The long-term or perpetual obligations created by a CA and the need to secure the natural features on land for a long time mean that a conservation body who is to monitor the compliance of a landowner with the terms of a CA should be able to do this task throughout the whole period. This

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[92] In most jurisdictions, for example, in NSW, a CA will be terminated where a mining license is granted on agreement land (BCA 2016 (n 16) s 5.18). In Scotland, the extinction of conservation burdens can be made by compulsory purchase (TC(S)A 2003 (n 68) ss 106–107).

[93] Some nongovernmental bodies may also face such conflicts in priorities where they have a broad range of aims, for instance if promoting recreation sits alongside conservation.

[94] B Mitnick, *The Political Economy of Regulation* (Columbia University Press 1980) 91.

[95] Rodgers (n 13) 303.

[96] M Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 Cambridge Law Journal 129.

[97] P Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 Cambridge Law Journal 63.

[98] Owley (n 75) 11.

[99] See, for instance, the powers of the Office of the Scottish Charity Regulator <www.oscr.org.uk/>.

requirement could be a disadvantage in using an NGO in that this type of body could collapse or cease to exist,[100] without the succession arrangements normally put in place for public bodies, leaving no one willing to monitor an agreement. Moreover, a CA could be in effect abandoned if the holder becomes unable or unwilling to enforce it. This kind of weakness has been instrumental in shaping the views of several US scholars who argue that private land trusts might be inappropriate bodies to look after perpetual conservation easements.[101] Moreover, there is concern that there is too great a reliance on the use of CAs rather than considering more deeply what is the most appropriate land conservation tool for the circumstances, such as fee ownership and contractual payments.[102]

This should not be a significant concern with governmental or public bodies, because they have a formal responsibility for their functions, which can only be relinquished formally. This means that there should always be a responsible body to look after the agreement. For NGOs there is no such guarantee of continuity. The likelihood of difficulties can, however, be reduced by providing for a third-party right of enforcement, as employed in the US. As observed from the Maine case, those who are conferred a third-party right of enforcement may bring an action to the court.[103] An arrangement whereby the rights under a CA default to a state body in the event of the holder no longer being available could also be a response to this potential problem.[104]

5.2.3 Justification of use of public money for achieve the task

The use of public money is only justifiable where it is used to serve a public interest, and requires some transparency and accountability to the public.[105] This means that, in theory, to the extent that public funding supports a CA scheme, placing that scheme in the hands of a public authorities is likely to appropriate. Where there is a lack of transparency and accountability it becomes more questionable whether it is justified to spend public money (through direct support or, as in the US, through the provision of tax breaks) to support specific conservation activities governed by non-public bodies.[106] This problem might manifest itself where despite an input of public funds the implementation of a CA fails due to non-compliance enabled through a lack of monitoring.[107] Moreover, a legal tool that supposedly serves the public interest but is largely in the hands of private bodies may be viewed as having no or low legitimacy and can be criticized as a poor basis for sustainable land-use policy.[108]

5.2.4 Increase in the complexity in governing rules

[100] AW Morris and AR Rissman, 'Public Access to Information on Private Land Conservation: Tracking Conservation Easements' (2009) 6 Wisconsin Law Review 1237, 1241.
[101] Bray (n 43) 137.
[102] J Owley et al, 'Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools' (2018) 95 Denver Law Review 727, 761–764.
[103] Maine Revised Statutes, §478.
[104] TC(S)A 2003 (n 68) s 39.
[105] Law Commission (n 34) para 4.94; Owley (n 75) 11.
[106] Owley (n 75) 11.
[107] The risks here could be eased by an obligation on CA holders to report on their supervision of the CAs they hold, as in Maine.
[108] Holligan (n 83) 71.

As noted above, the implementation of CAs requires a legal framework, and where governance is in the hands of not just governmental bodies but also a range of NGOs, the governing regime will be more complex. The complexity of the governing regime arises from the need to establish rules for a degree of public oversight,[109] and the requirements for provisions to ensure the achievement of public interest, the presence of accountability, transparency and continuity, as well as assurances over the use of public spending. The necessary complexity of the governing rules would be an obstacle to the success of the implementation of this legal technique, and potentially a distraction from actually achieving meaningful conservation on private land.

6 CONCLUSION

The trend towards environmental governance by multiple players can be examined by studying the governance of CAs in NSW, Scotland and Maine. Although they share common features, each provides a different role for NGOs in the creation, oversight and enforcement of agreements. Even where NGOs can become involved, governmental bodies still play a vital role in CA governance.

This article shows that there is no clearly preferable solution in abstract, and choices have to be made based on a number of variables. Where there are strong, well-funded and trustworthy NGOs in existence, there are attractions in using CAs as way to embrace them as formal partners in the conservation enterprise, supplementing or to some extent even replacing what the public bodies can do. Yet ensuring that the public interest is always served may entail a degree of complexity and oversight that is not worthwhile if CAs are likely to play only a marginal role. Similarly, involving more bodies in determining which features will benefit from legally recognized conservation measures can be seen as either a welcome diversification away from the blinkered vision of the governmental conservation priorities or an unwelcome fragmentation that threatens to undermine a coherent long-term conservation strategy. Recent developments such as the increasing recognition of CAs are offering governments more choice in how to go about the task of conservation, but regulatory design is always a matter of finding what works best in the particular legal, political and socioeconomic context.

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[109] S Fairfax and D Guenzler, *Conservation Trusts* (University Press of Kansas Lawrence 2001) 153.